Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1901

SAMUEL H. SLOAN,

Petitioner,

-against-

CANADIAN JAVELIN LTD., AMERICAN STOCK EXCHANGE, DOW JONES & CO., INC., JOHN C. DOYLE, WILLIAM M. WISMER, LEE & MARTIN, LEE & MARTIN, STEWART PINKERTON, STANDARD & POOR'S CORP., BISON PETROLEUM & MINERALS LTD., ROBERT BENOIT MAJOR, PAVONIA, S.A., JOHN BOUCHARD, CANADA PERMANENT TRUST CO., THE MIAMI HERALD, PICKANDS, MATHER & CO., WRIGHT ENGINEERS, LTD., TECHNICAL ECONOMISTS LTD., WATTS, GRIFFIS & McQUAT LTD., JOSEPH R. SMALLWOOD, ANGLO AMERICAN CORP., PETER JEFFREY, INSTITUTIONAL SERVICES (DEUTSCHLAND) GMBH, ENGINEERING SERVICES, LTD., OLIVER L. VARDY, A.I.S. RESOURCES LTD., WORLD MINING, McGRAW-HILL INC., STEVEN L. GERARD, ARTHUR FOOTE, ROBERT DE LA, RAYMOND ARONSON, BACHE & CO., INC., BOUCHARD & CO., BURNS BROS & TIMMINS INC., CHARTERED NEW ENGLAND CORP., DAVIDSON PARTNERS LTD., DOMINICK & DOMINICK INC., DYER MAGUIRE DRITZ & CO., EDWARDS & HANLY, LOEB, RHOADES & CO., MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., F.S. MOSELEY, ESTABROOK & CO., INC., MULLER & CO., OSWALD, DRINKWATER & GRAHAM LTD., PRESSMAN, FROHLICH & FROST, INC., WEISS & BAER, INC., WOOD, WALKER & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated February 6, 1976 which affirmed on the grounds of "lack of prosecution" the decision of a district court to dismiss an amended complaint without leave to replead and to review the decisions dated April 1, 1976 in which a petition for rehearing and a suggestion that the rehearing be in banc was denied.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Second Circuit have not been officially reported and are included as Appendix A to this petition. The opinion of the United States District Court for the Southern District of New York, Bonsal, J., which dismissed the action, was

reported at CCH Fed. Sec. Law Rep. ¶ 94,579 [1973-74 transfer binder] and was not otherwise reported. A copy of this opinion is included as Appendix B to this petition. A copy of the subsequent order of the district court which denied the motion for relief from judgment, reargument and leave to file on amended complaint is included as appendix C to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on February 6, 1976. A petition for rehearing and suggestion that the rehearing be in banc was denied on April 1, 1976. Jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from April 1, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Did the District Court, Bonsal, J., err in its decision to dismiss *sua sponte* the amended complaint with prejudice and without leave to replead as to all but three of the defendants and without prejudice as to the remaining three defendants?

2. Did the District Court abuse its discretion in denying the motion for relief from judgment, reargument and leave to file an amended complaint?

3. Did the United States Court of Appeals for the Second Circuit err in affirming the judgment of the District Court on the grounds of lack of prosecution?

4. Did the Court of Appeals err in receiving oral argument from an attorney who had not appeared in the District Court in this case, who had not filed a notice of appearance in the Court of Appeals, and who did not indicate which client, if any, he was representing?

5. Was the petitioner deprived of his due process rights in that only two judges participated in the decision of the Court of Appeals, the third having been called out of town due to an illness in his family?

6. Was the petitioner deprived of his Fifth Amendment due process rights to notice and the opportunity for a hearing as well as his First Amendment right to petition the government for a redress of grievances by the actions of the District Court and the Court of Appeals?

7. Does the two sentence summary disposition of a highly meritorious appeal such as this one deprive the appellant of his right to due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, in pertinent part, states:

Congress shall make no law . . . abridging . . . the right . . . to petition the government for a redress of grievances.

The Fifth Amendment, in pertinent part, states:

"No person shall . . . be deprived of . . . liberty or property without due process of law . . . "

STATUTES AND RULES INVOLVED

28 U.S.C. §46(b) provides:

In each circuit the court may authorize the hearing and

determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at times and places and hear the cases and controversies assigned as the court directs.

Federal Rule of Civil Procedure 41(b), in pertinent part, states:

> "For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Section 2001 of the New York Civil Practice Law and Rules states:

> "At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect, or irregularity shall be disregarded.

Section 2004 of the New York Civil Practice Law and Rules states:

> "Except where otherwise expressly prescribed by law, the court may extend the time fixed by statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extention is made before or after the expiration of the time fixed."

The Rules of the United States Court of Appeals for the Second Circuit, §0.23 states:

> "The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion,

disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."

STATEMENT OF THE CASE

In 1973, the petitioner, Samuel H. Sloan ("Sloan"), engaged in the short sales, repurchases and borrowings of shares of Canadian Javelin Ltd., a Dominion corporation which was traded on the American Stock Exchange. At one point, Sloan had sold short as much as 33,400 shares of that security. This proved to be inopportune as the price of Canadian Javelin Ltd. shares rose from a closing of 7 1/8 on July 3, 1973 to a high of 14 5/8 on July 26, 1973.1 Following this rise in price, most of the shares Sloan sold short were bought-in by the brokers and dealers to and through whom Sloan had sold. These brokers and dealers are named as respondents to this petition. The actual trading losses Sloan realized thereby came to ap-

1. These facts and circumstances are the subject of Judge MacMahon's opinion reported as *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648 (S.D.N.Y. 1974) *appeal dismissed* (2d Cir. January 7, 1976) and were referred to parenthetically in *Sloan v. S.E.C.*, 527 F. 2d 11, 12 (2d Cir. 1975) *cert. denied* June 14, 1976 Docket No. 75-1507.

proximately $170,000.2

On September 4, 1973, Sloan instituted suit in the United States District Court for the Southern District of New York and filed a complaint under Docket No. 73 Civil 3801. A subsequent verified amended complaint bearing Docket No. 73 Civil 4403 was filed which charged the 48 then named defendants, who are listed as the respondents to this petition, with "violations of Sections 5, 12, 15 and 17 of the Securities Act [of 1933], Sections 9(a), 10(b), 13(d), 15(c) and 18(a) of the [Securities] Exchange Act [of 1934], Rules 10(b)-5 and 15(c) 3-3 promulgated thereunder, the rules of the New York Stock Exchange, the American Stock Exchange and the National Association of Securities Dealers, state law and the principles of common law." Jurisdiction was alleged to be based upon "Section 22 of the Securities Act of 1933 (15 U.S.C. §77o) (the "Securities Act"), Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa) (the "Exchange Act") and the doctrine of pendent jurisdiction."

None of the defendants who subsequently appeared in the Court of Appeals filed motions to dismiss the amended

2. More than one hundred seperate purchases and sales are involved in this case and not all of them occured within the specific July period. However, it was in July that Canadian Javelin Ltd. experienced its greatest rise in price and hence this was the period in which almost all of the losses were sustained. Sloan did the majority of his short selling in July, 1973 and most of the short sales were bought-in in August, 1973. The amended complaint and the affidavits and papers filed in the district court make it clear that all Canadian Javelin Ltd. trades in early and mid-1973 are the subject of this lawsuit. (Thereafter, trading in Canadian Javelin Ltd. was suspended by the American Stock Exchange on October 25, 1973 and by the Securities Exchange Commission on November 29, 1973. Trading resumed for a time in 1975 but at a lower price. Presently, because of the operation of S.E.C. Rule 15c2-11, 17 C.F.R. 240.15c2-11, there is no market for shares of Canadian Javelin Ltd. in the United States but there is trading on the Montreal Stock Exchange at around $1.75 per share).

complaint dated December 29, 1973 on any ground. However, in an eighteen (18) page opinion dated May 30, 1974, Judge Bonsal *sua sponte* dismissed all pending complaints with prejudice and without leave to replead as to all but three defendants and without prejudice as to the remaining three defendants. On June 11, 1974, a judgment was entered in favor of the defendants. A copy of this judgment is included as Appendix D to this petition. On June 17, 1974, Sloan's motion for relief from judgment, reargument and leave to file an amended complaint was summarily denied.

On June 26, 1974, a notice of appeal to the United States Court of Appeals for the Second Circuit was filed which sought review of the rulings of the District Court. This appeal was argued on February 2, 1976. Although a total of eighteen attorneys and law firms plus the Securities and Exchange Commission had appeared in the District Court, only two briefs for the appellees were filed in the Court of Appeals. One of these briefs was filed by counsel primarily for Canadian Javelin Ltd. and another defendant against whom Judge Bonsal had dismissed the action without prejudice. The other brief was filed by a conglomeration of either nine or eleven law firms representing either sixteen or eighteen defendants depending on whether one relied upon the inside or the outside of this brief. None of these law firms appeared to be taking principal responsibility for what was said in this brief.[3] However, the appeal was not argued by any of the many attorneys who had appeared in

3. The outside of the brief contains the names of nine law firms and attorneys and sixteen defendants. Two more defendants, who are said to be among those "joining in this brief" are listed on page 2 thereof. These two defendants were represented by the law firms of Cravath, Swaine & Moore and Lunney & Crocco in the District Court but the names of these law firms do not appear anywhere in the briefs filed in the Court of Appeals

this lawsuit in the District Court. Instead, the procedural aspects involved in this appeal were argued by one Michael G. Shannon, who had become a member of the bar of the Second Circuit shortly before oral argument and who had been a law school student at the time Judge Bonsal made his decision. A letter from Mr. Shannon following oral argument indicated an affiliation with the law firm of Amen, Weisman & Butler. This law firm had never appeared in either the District Court or in the Court of Appeals. Mr. Shannon did not indicate which particular defendant or defendants, if any, he was representing when he presented oral argument to the Court of Appeals.

On February 6, 1976, in a two sentence decision, the judgment of the District Court was affirmed by a two judge panel of the United States Court of Appeals. A third judge, Hays, who sat on the panel which heard oral argument, was called out of town due to an illness in his family and did not participate in making the decision.[4] On April 1, 1976 Sloan's petition for a rehearing and suggestion that the rehearing be in banc was denied without opinion. The petitioner now requests a writ of certiorari issue to review these decisions.

4. Although a space was left for his signature, Judge Hays did not sign the decision. Whether he concurred in the decision or participated informally in any way cannot be determined from the record. However, it is unlikely that he did so since he had been substituted in place of Judge Medina at the last moment after oral argument was adjourned for four days. Unlike the other two judges on the panel, Judge Hays remained silent throughout oral argument and probably had not had time to become familiar with this appeal. Thus, it is reasonable to conclude that this case was decided by two judges rather than the three required by 28 U.S.C. §46(b). This point was raised in Sloan's petition for rehearing and suggestion that the rehearing be in banc but was greeted with silence from the court.

REASONS FOR GRANTING THE WRIT

This petition presents important questions which can be expected to come up on almost a daily basis in the federal courts. Although Judge Bonsal's opinion is not clear as to exactly why he decided to dismiss the complaint and the decision of the Court of Appeals even more unspecific, it appears that Judge Bonsal justified his dismissal of the action primarily on the grounds that Sloan was nineteen (19) days "late" in filing an amended complaint.[5] If it could be demonstrated that Sloan was indeed "late" and that by being late Sloan wilfully disobeyed a valid court order, Fed. R. Civ. P. 41(b) would seem to authorize Judge Bonsal to dismiss the action on motion by a party. However, since no timely and appropriate written motion was filed, Judge Bonsal seemingly relied upon *Taub v. Hale* 355 F.2d 201, 202 (2d Cir. 1966) where the Court of Appeals held that

> "a district judge may, *sua sponte*, and without notice to the parties, dismiss a complaint for want of prosecution, and such dismissal is largely a matter of the judges discretion."

It is submitted that the court's decision in *Taub v. Hale* is erroneous on this point and should be overruled since

5. Although this is the only reasonable conclusion which can be drawn, it should be observed that on the last page of his opinion, Judge Bonsal stated that even if Sloan had filed the amended complaint on time it would have been dismissed anyway. Thus, the real reason for Judge Bonsal's dismissal is apparently contained in other remarks he made in his opinion. However, in its decision of another appeal from a judgment entered by Judge Bonsal, the Second Circuit reversed on every point made by Judge Bonsal here. See *Felton v. Walston & Co.*, 508 F. 2d 577 (2d Cir. 1974). For example, it stated that Judge Bonsal was in error for holding that the complaint was insufficient because it failed to allege reliance (See appendix 18a) and because it did not set forth the details of the specific transactions entered into by the plaintiff (See Appendix 6a).

Article III of the Constitution prohibits a judge from taking action *sua sponte* in most cases. However, this question need not be reached here because the facts and circumstances of this case are so vastly different as to make that decision nearly irrelevant.

Since attorneys are often late in doing things such as answering complaints, opposing motions and responding to interrogatories, the question frequently arises as to how far a judge can go in imposing sanctions upon a party who has been dalliatory. See e.g. *Flaks v. Koegel* 504 F.2d 702, 709-710 (2d Cir. 1974); An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed For The Purpose Of Insuring Compliance With Pretrial Orders, 29 F.R.D. 420 (1962). This is not to say that the case presented here is exactly like a hundred or a thousand other cases which might be in various stages of litigation in the federal courts. The facts and circumstances present here are rather bizarre[6] but that does not diminish the importance of the questions presented. For example, if there could be no doubt that Judge Bonsal entered a valid order directing Sloan to file an amended complaint and that Sloan contumaceously disobeyed this order and was nineteen days late, a clear legal question would be presented. However, this question is muddled by the fact that here no order was entered directing Sloan to do anything whatever. Instead, Judge Bonsal said something to Sloan, but no record was made of what he said.

6. It is clear from *Felton v. Walston & Co., supra*, that the bizarre circumstances of this case arose not because of Sloan's litigation practices but because of the highly individual and irregular manner in which Judge Bonsal conducts the business of his court including his practice of *sua sponte* dismissing complaints and failing to grant leave to file amended complaints with the liberality contemplated by Fed.R.Civ.P. 15(a) and this Court's decision of *Foman v. Davis*, 371 U.S. 178, 182 (1962).

It should be clear that if Judge Bonsal "ordered" Sloan to file an amended complaint, there might be some basis for his ultimate disposition of this case but if he merely granted leave to file, a dismissal of the amended complaint does not follow. The Court of Appeals, in *International Business Machines Corp. v. Edelstein,* 526 F.2d 37, 45 (2d Cir. 1975), said that it would not consider rulings or evidence which are not part of the district court record since it "will not speculate about the proceedings below." However, the Court of Appeals did not follow that decision here because had it done so it would have been required to vacate the judgment of the District Court and to remand for further proceedings. That is not the only prior Court of Appeals decision which was not followed in this case. Although the Court of Appeals did not write a formal opinion which would become the law of the Circuit but instead resorted to a two sentence summary disposition which will not be published and therefore may not be cited in accordance with §0.23 of the Rules of the Second Circuit, it is clear that the decision here is in conflict with decisions of other circuits, see *Meeker v. Rizley* 324 F.2d 269, 271-272 (10th Cir. 1963); *Sykes v. United States,* 290 F.2d 555 (9th Cir. 1961); *Jarva v. United States.* 280 F.2d 892 (9th Cir. 1960); *Flaska v. Little Marine River Construction Co.* 389 F.2d 885 (5th Cir. 1968) *cert. denied* 392 U.S. 928 (1968); *Rankin v. Shayne Bros. Inc.* 280 F.2d 55 (D.C. Cir. 1960), and with prior decisions of the Second Circuit, see *Lyford v. Carter* 274 F.2d 815 (2d Cir. 1960); *Peterson v. Moore* 267 F.2d 496 (2d Cir. 1960). Moreover, under this Court's decision of *Hanna v. Plumer* 380 U.S. 460 (1965), the federal courts must follow state law in matters such as this which will "substantially affect" the outcome of this suit, see 1 Moore's Federal Practice 0.305 [3], and the disposition by the Court of Appeals here flies in

the face of the New York Civil Practice Law and Rules and every comparable New York State court decision. See e.g. *Griffin v. Vallot* 59 Misc. 2d 870, 300 N.Y.S.2d 684 (1969); *Murray v. City of New York* 40 A.D. 2d 539, 334 N.Y.S. 2d 524 (Second Dept. 1972); *Palmer v. New York City Transit Authority* 33 A.D. 2d 119, 305 N.Y.S. 2d 831 (First Dept. 1969); *Luna Park Housing Corp. v. H.R.H. Construction Corp.* 37 A.D. 2d 814, 324 N.Y.S. 2d 800 (First Dept. 1971).

In addition in other respects the Court of Appeals departed from the accepted and usual course of judicial proceedings and further sanctioned a similar departure by a lower court. It is most unusual for two judges, rather than the required three, to decide an appeal and the fact that this occurred here raises a question which by its nature can only be reviewed by the Supreme Court of the United States. Moreover, nowadays approximately half of the appeals to the Second Circuit are decided summarily. In the case presented here, the appeal was clearly meritorious and yet the Court of Appeals summarily affirmed and in so doing refused to deal with the arguments presented. This raises the important question of whether Sloan and other appellants in his position are being deprived of their Fifth Amendment due process rights as well as their First Amendment right to petition the government for a redress of grievances by this sort of summary action.

Finally, the entire manner in which this case was handled in the District Court is inconsistant with prior Supreme Court decisions. The District Judge did not grant freely leave to file an amended complaint as required by *Foman v. Davis* 371 U.S. 178, 182 (1962) nor did he construe the allegations of the complaint with liberality as required by *Scheuer v. Rhodes* 416 U.S. 232, 236 (1974)

nor did he apply the standard of pleading held to be sufficient in *Conley v. Gibson* 355 U.S. 41, 47 (1957). Moreover, the drastic remedy of dismissal of the action is not compatable with Supreme Court decisions of *Societe Internationale v. Rogers* 357 U.S. 197, 209 (1958); *Hammond Packing Co. v. Arkansas* 212 U.S. 322, 347-351 (1909) and *Hovey v. Elliott* 167 U.S. 409 (1897). Thus, all of the many reasons set forth in Rule 19(1) of the Supreme Court Rules for the granting of a petition for a writ of certiorari are present in this case and the questions presented here are too important for review to be denied.

ARGUMENT

Although the record of the proceedings in the District Court is voluminous, there was no hearing and the only transcript is four pages of recorded colloquy which took place on January 14, 1974. Thus, the applicable facts of this case are readily ascertainable and once ascertained should be indisputable because the issue here is not whether Sloan's lawsuit has merit but whether circumstances occurred which justified the extraordinary measure of dismissal on the grounds of "lack of prosecution."[7]

It is patently obvious that the decision of the Court of Appeals is in error. For the Court of Appeals to be correct in its conclusion that the action was properly dismissed for

7. The briefs for the appellees filed in the Court of Appeals argued that the complaints failed to state a claim upon which relief could be granted. In view of the disposition by the Court of Appeals, if the respondents wish to press that argument here they must file cross petition for a writ of certiorari. See e.g. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2 (1975). The instant petition must, of necessity, confine itself to the question of whether the affirmance by the Court of Appeals on the grounds of "lack of prosecution" was proper.

lack of prosecution, it must overcome the fact that none of the defendants in the District Court argued before Judge Bonsal that the complaint should be dismissed for failure to prosecute, that Judge Bonsal did not state in his opinion that he was dismissing the complaint for failure to prosecute, and that the appellee's briefs in the Court of Appeals did not argue that the action was dismissed for failure to prosecute. Furthermore, the Court of Appeals must overcome the fact that the plaintiff quite obviously did not fail to prosecute and indeed that he displayed the considerable zeal and energy necessary to perform the herculean tasks put to him by Judge Bonsal.

The term "failure to prosecute" has a specific legal meaning. Since the question here is one of procedure, the federal courts are required to follow state procedural rules since they will "substantially affect" the outcome of this suit. See 1 Moore's Federal Practice 0.305[3]; cf. *Hanna v. Plumer* 380 U.S. 460 (1965). In New York State law, the power of a court to dismiss a complaint for failure to prosecute rests in CPLR §3216 which provides that "where a party unreasonably neglects to proceed . . . the court, on its own initiative or upon motion, may dismiss the parties pleadings *on terms.*" (emphasis supplied). In practice, the words "on terms" means that a party is always given a second chance to take corrective action. Moreover, CPLR §3216 provides that "no court initiative shall be taken unless . . . one year has elapsed since the joinder of issue." In addition, CPLR §3216 provides that a dismissal for failure to prosecute shall not be "on the merits." In practice, in the New York State courts, the result of this provision is that there is no such thing as the dismissal of an action for failure to prosecute "with prejudice" unless, of course, the statute of limitations has expired.

In the federal courts, in cases dealing with failure to prosecute, a one year rule seems to be applied in all jurisdictions. For example, in a case cited in Judge Bonsal's opinion, *State Steamship Co. v. Philippine Air Lines* 426 F.2d 803, 805 (9th Cir. 1970), the court found the decision of *Flaska v. Little River Marine Construction Co.. supra* to be "readily distinguishable" because there "the complaint was less than a year old when it was dismissed." Similarly Rule 23(a) of the General Rules of the Southern District of New York indicates that civil causes may be dismissed for failure to prosecute if they "have been pending for more than a year and are not on the trial calendar." With regard to the standard to be applied in reviewing cases which have been dismissed for failure to prosecute, the court in *Durham v. Florida East Coast Ry* 385 F.2d 366 (5th Cir. 1967) stated:

> "The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumaceous conduct by the plaintiff."

The case presented in this petition does not involve anything resembling a one year delay and consequently there can be no dismissal for failure to prosecute. Indeed, the record itself fails to establish that there was any delay whatever. The gravament of the assertion by the Court of Appeals that Sloan failed to prosecute his case diligently would seem to be based upon the claim that Sloan disobeyed a court order which required him to file an amended complaint within twenty (20) days. However, it is obvious that Sloan could not have disobeyed a court order because there was no court order. Rule 11(a) of the General Rules for the Southern District of New York states that "[A] memorandum signed by the judge . . . shall constitute the order . . . " Rule 13 of the General Rules for the

Southern District of New York, which sets forth the form of orders, indicates that an order must be in writing. Additionally, Fed. R.Civ. P. 79(a) provides that all orders shall be entered. Since Judge Bonsal refused to enter an order or otherwise to commit himself to writing, there was no order with which Sloan failed to comply.

An examination of the docket sheets shows that in the course of this lawsuit, Judge Bonsal entered a total of eight orders, none of which say anything about an amended complaint. The orders were as follows: (1) a stipulation and order of discontinuance as to defendant George B. Mickum dated October 9, 1973; (2) a stipulation and order dated November 9, 1973 extending until November 20, 1973 the time of a defendant to answer the complaint; (3) a default judgment in the amount of $31,606.03 on behalf of defendant Bache & Co. dated January 9, 1974; (4) an order dated February 13, 1974 extending until March 13, 1974 the time of defendant Pickands, Mather & Co. to answer; (5) an order dated March 13, 1974 extending until April 15, 1974 the time of defendant Pickands, Mather & Co. to answer; (6) an order dated April 12, 1974 extending the time of defendant Pickands, Mather & Co. to answer until the tenth day after the entry of an order upon the decision on motions of the other defendants; (7) the order and judgment dismissing the complaint and, *inter alia,* vacating the default judgment previously obtained by Bache & Co. and (8) an order dated June 17, 1974 denying Sloan's motion for relief from judgment, reargument and leave to file an amended complaint. This constitutes a complete list of the orders entered in this case and clearly Sloan did not and could not have disobeyed any of them. Again, Fed. R. Civ. P. 79(a) states:

> "All papers filed with the clerk, all process issued . . . all . . . orders and judgments shall be entered chronologically in the civil docket . . . "

From this it is clear that Sloan did not disobey a court order because there was no validly entered court order to disobey. Consequently, the Fifth Amendment requires that there can be no dismissal of the complaint on this ground. *Societe International v. Rogers* 357 U.S. 197, 209 (1958).

In his decision, Judge Bonsal contradicts himself, first stating that he "granted leave" (appendix 11a) then that he ordered (appendix 14a) and finally that he "directed" (appendix 18a) Sloan to file an amended complaint. The distinction between "ordered" and "granted leave" has cogent legal significance. What Judge Bonsal apparently is referring to is the statements he made on November 19, 1973 with Sloan and two defense attorneys present, and unfortunately no court reporter was present to memorialize his oral remarks. The briefs filed by the opposing sides in the Court of Appeals reveal substantial differences concerning what precisely it was that Judge Bonsal said on that date and thus, assuming that one accepts the theory presented in the appellee's briefs which were filed in the Court of Appeals, which was that Judge Bonsal's determination could be based not upon Rule 41(b) but upon the inherent "power of a court to dismiss *sua sponte* for failure to obey its directions" (See Brief for Dow, Jones & Co. et al p. 10-11), the resolution of this appeal would appear to turn upon the decision of whom the Court of Appeals chooses to believe.

Judge Bonsal's opinion portrays Sloan as a litigant with a cavalier disregard for the Federal Rules of Civil Procedure. An examination of the record, however, demonstrates that nothing could be further from the truth. In fact, Sloan was a harassed plaintiff who was forced to work night and day to perform tasks required by Judge Bonsal's capricious demands, demands which he clearly

would not have made of any member of the bar. The defendants do not disagree. In fact, neither of the two briefs filed by the appellees in the Court of Appeals contended that the action was or could have been dismissed for failure to prosecute. Instead, the principal argument advanced there was that Sloan failed to comply with Fed. R.Civ.P. 9(b) which requires that the facts constituting fraud be set forth with particularity. In advancing this argument, the brief for Canadian Javelin Ltd. on page 10 thereof, stated:

> "The sheer quantity of paper work involved in this action, if performed by Sloan without legal help, on the one hand demonstrates such zeal, energy and familiarity with the law as to, on the other hand, render inexcusable his failure to comply with the rules of the court."

This argument is not compatable with an assertion that the action should have been and was dismissed for lack of prosecution and indeed, as noted previously, none of the defendants made this assertion in either the District Court or the Court of Appeals. For that matter, nowhere in Judge Bonsal's decision was a statement made that the action was being dismissed for lack of prosecution.

Because Judge Bonsal's decision was unclear as to his reasons for dismissing the action, the brief field by Sloan in the Court of Appeals postulated that the action might have been dismissed for failure to prosecute and then demonstrated that if this was the case, Judge Bonsal's determination was factually and legally erroneous. Rather than dispute that point, the appellees argued that the complaint was *not* dismissed for failure to prosecute. On pages 9-10, the brief for Canadian Javelin Ltd. stated:

> "The suggestion at page 22 of Sloan's brief that the complaint was dismissed solely for failure to prosecute is utterly erroneous."

Similarly, the other brief filed by an appellee in the Court of Appeals did not argue that this action was dismissed for failure to prosecute. Pages 8-9 of this brief states:

> "The decision of Judge Bonsal reveals three substantial grounds for the dismissals—the filing of an amended complaint after the expiration of the time directed by the court; the failure of the untimely complaint to comply with the specificity requirements of Rule 9(b) F.R.Civ.P., as interpreted in this circuit, and the failure of the complaint to show any direct injury to Sloan."

At this point it should be said that much of the oral argument in the Court of Appeals was concerned not with lack of prosecution but with the question of whether Sloan's amended complaint was insufficient. The appellees relied principally upon that part of *Felton v. Walston & Co., supra* which affirmed Judge Bonsal's decision. That opinion reflects how far the Second Circuit has gone towards reverting to the technical rules of common law pleadings in securities fraud cases. As Judge Waterman noted in An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed For The Purpose of Insuring Compliance With Pretrial Orders, supra, these common law rules of pleading "heightened the adversary aspect of litigation and more often than not led to dismissals of causes—dismissals that were patently unjust," 29 F.R.D. at 420. This is precisely what has occurred here. Judge Bonsal's decision states:

> "In light of the standards of Rule 9(b), the amended complaint lacks the required specificity, such as with respect to whether plaintiff relied on the alleged false and misleading statements and reports, whether the alleged fraudulent statements were made in connection with a purchase or sale of

> a security by him and whether the injuries of which plaintiff complains were caused in fact by defendants' alleged fraudulent activities. See *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* ——*F.2d*—— Dkt. No. 73-1677 (2d Cir. filed April 3, 1974)."

The truth is that the amended complaint which Sloan filed was a remarkable 43 page tour de force which set forth the times, places, dates and other facts and details which constituted precisely what each of the 48 named defendants was accused of doing specifically. That is all that is required by the Second Circuit's decision of *Segal v. Gordon* 467 F.2d 602, 607 (2d Cir. 1972) and is more than the concise statement of the grounds upon which the pleading rests held to be sufficient in *Conley v. Gibson* 355 U.S. 41, 47 (1957). None of the defendants have dared to challenge the sufficiency of Sloan's amended complaint on the grounds of lack of specificity. In fact, as noted previously, none of the appellee's challenged, in the District Court, the December 29, 1973 complaint on any grounds.[8]

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8. In a footnote on page 7 of the brief filed on behalf of Dow Jones & Co. and others in the Court of Appeals, these appellees assert:

> "Defendants Dow, Jones & Company, Inc. and Muller & Co. made oral motions to dismiss the fourth amended complaint on January 14, 1974, which motions were entertained by the Court."

Apparently, the appellees felt the need to say this in view of the fact that none of them filed written motions to dismiss that complaint. However, Fed.R.Civ.P. 7(b)(1) states that all motions "shall be made in writing" and accompanied by "written notice of the hearing of the motion." Moreover, Rule 9(b) of the General Rules of the Southern District of New York requires that the moving party file with the motion papers a memorandum of law. The defendants made no attempt to comply with these rules and clearly they are contending that the plaintiff should be held to strict compliance with the rules of court whereas the defendants should be given license to disregard those same rules.

However, Judge Bonsal's opinion does not state that the complaint failed to inform the defendants of what they were accused of doing. Rather, it says that the plaintiff failed to provide sufficient information about himself and failed to advance legal theories which Judge Bonsal apparently felt were required to entitle the plaintiff ultimately to prevail. In support of his view that a plaintiff should be required to set forth a wealth of information in order to be able to enter the doors to the federal courthouse, Judge Bonsal cites a decision which was not handed down until more than three months after the date of Sloan's amended complaint.[9] Thus, from reading Judge Bonsal's opinion in the light most favorable to the defendants, it is still obvious that Sloan did not know and could not have known what information he was expected to provide in the amended complaint which Judge Bonsal says that he was directed to file.[10]

The decision of the Court of Appeals expressly avoids any determination of the question of whether the amended complaint failed to comply with Fed.R.Civ.P. 9(b). However, the Rule 9(b) question is inexorably intertwined with the question of whether the amended complaint was late because any theory which would give Judge Bonsal the authority to order *sua sponte* Sloan to file an amended complaint would have to be based upon a determination that the complaints which were already before him were

9. Of course, the decision which Judge Bonsal cites, *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 495 F. 2d 228 (2d Cir. 1974), lends no support to the new pleading rules which Judge Bonsal apparently seeks to establish by his decision.

10. It should be noted that Judge Bonsal's statement that Sloan's amended complaint was deficient because it failed to allege reliance is incompatable with this court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-154 (1972) which eliminated proof of reliance as a prerequisite to recovery in securities fraud cases.

insufficient. This includes the so-called third complaint dated November 7, 1973 which Sloan sought to file ex parte as a matter of course in accordance with Fed. R.Civ. P. 15(a). This complaint, which resembles the fourth complaint, is clearly sufficient as to most if not all of the named defendants.

It has been pointed out several times previously that although certain appellees filed briefs in the Court of Appeals which argued that the December 29, 1973 complaint was insufficient, none of them filed motions in the District Court to dismiss it on this ground.[11] This was not due to oversight but to a tactical choice the defendants made to refuse to acknowledge the existence of this amended complaint. As noted previously, Judge Bonsal refused to enter a written order granting Sloan leave to file an amended complaint. This occurred even though Sloan had submitted to Judge Bonsal a proposed order. The lack of a written order combined with the fact that almost none of the defendants were represented in court on November 19, 1973 when Judge Bonsal says he directed Sloan to file an amended complaint, caused many of the defendants to contend that the December 29, 1973 complaint was a legal

11. Judge Bonsal's opinion lists what he says were a number of motions to dismiss the December 29, 1973 complaint. (Appendix 12a). This was clearly erroneous. With two exceptions, these motions were not directed towards the December 29, 1973 complaint and in fact on January 14, 1974, when these motions were argued, the U.S. Marshal had not yet served or had only recently served these defendants. The exceptions each involved a defendant named for the first time in the December 29, 1973 complaint who therefore did not have standing to challenge its supposed lateness. In those motions, the claim was that the District Court lacked jurisdiction, a claim which was not pressed on appeal. It should be noted that many of the defendants, including Canadian Javelin Ltd. and William M. Wismer against whom the action was dismissed "without prejudice", challenged the jurisdiction of the District Court on the grounds that they were subject only to the jurisdiction of the Canadian courts. However, Judge Bonsal's opinion makes no mention of this fact. Instead, he implies that the defendants made arguments which in fact they did not make.

nullity which need not be answered. Although the U.S. Marshal served the named defendants, with the exception of a few who could not be located, many of them returned the amended complaint to Sloan by mail along with a letter, a copy of which was sent to the court and is part of the record, stating that they were treating Sloan's amended complaint as a nullity because he had not obtained court leave to file. It is thus obvious that these defendants decided not to challenge the sufficiency of the amended complaint or to answer or respond in any way because to do so would be to concede that the amended complaint was properly before the court. Thus, the defendants adopted a wait and see attitude and refused to commit themselves in any way. As a result, they became the beneficiaries of a windfall decision. Judge Bonsal dismissed the action with prejudice as to all but three of the defendants including defendants who had never moved to dismiss, many of whom had been named for the first time in the December 29, 1973 complaint and many of whom had never even appeared in the action.[12]

By now, the incorrectness of the decision of the Court of Appeals should be readily apparent. However, some of the things which Judge Bonsal says in his decision require brief attention even though they presumably did not form a basis for the subsequent affirmance by the Court of Appeals. Again it should be pointed out that from reading the courts decision in *Felton v. Walston & Co., supra,* and comparing it with Judge Bonsal's opinion here, the answers to many questions concerning what Judge Bonsal did and why he did it become readily apparent.

12. Since Judge Bonsal dismissed the action with prejudice as to these defendants it is clear that he regards the doctrine of res judicata as barring any suit by Sloan against them. Whether he had the authority to enter such a judgment raises a gamut of legal questions.

Judge Bonsal commences his opinion with material of a scandalous nature which is clearly irrelevant to the merits of the case before him. This approach to judicial decision making is highly censurable and is probably a violation of the oath prescribed by 28 U.S.C. §453 which requires that every judge of the United States swear that he "will administer justice without respect to persons." However, not only did the Court of Appeals fail to rebuke Judge Bonsal for his attack upon the person of Samuel H. Sloan, but Judge Bonsal's decision set the precedent for subsequent opinions of a similar character by the Court of Appeals. See e.g. *Sloan v. S.E.C.* slip op. 2377 (2d Cir. March 4, 1976); *S.E.C. v. Sloan,* slip op. 3655 (2d Cir. May 10, 1976).

When Judge Bonsal gets around to discussing the case before him, illogic prevails. For example, at one point in his decision, Judge Bonsal states that "[T]he amended complaint of December 29, 1973 . . . fails to show that Mr. Sloan was in any way directly injured thereby." (Appendix 13a). However, at an earlier point in the same opinion, he states that "[w]ith respect to his alleged injury plaintiff alleges that while he was in short position, the price of CJV on the American Stock Exchange ("AMEX") went up . . ." (appendix 7a).

He also refers obliquely to the cost of litigation, (Appendix 16a) ignoring the fact that it was his own deviation from the accepted and usual course of judicial proceedings which greatly increased the costs which both the plaintiff and the defendants have been required to bear. Here it should be observed in 73 Civil 3801 there were no docket entries between November 14, 1973 and January 4, 1974 and in 73 Civil 4403 there were no docket entries between December 3, 1973 and January 2, 1974. Thus, it is reasonable to conclude that the defendants incurred no

added expense whatever because of the delay which supposedly took place from December 10, 1973 until December 29, 1973. On the other hand, on appeal, the expense which the appellee's bore in defending the actions which Judge Bonsal took *sure sponte* no doubt was considerable. On this point, the observations to be found in *Link v. Wabash R. Co.* 370 U.S. 626, 649 (1962) (Black, J., dissenting) are pertinent.

In spite of their interest in having the judgment of the District Court upheld, the appellee's made no effort to defend many of the things Judge Bonsal says in his opinion. For example, he criticizes Sloan for his "frivolous motions and other court filings" (Appendix 16a); yet no defendant could point to even a single example of a frivolous motion or any other frivolous court filing by Sloan. In a more serious matter, Judge Bonsal implies in one paragraph of his opinion (Appendix 13-14a) that Sloan was a participant in the fraud of which he complains. However, there is nothing in the record to support the statements that Judge Bonsal makes and from a factual point of view the implication of his remarks is indefensible. For example, one of the points, which again was not advanced by any party, was that Sloan's participation in the fraud was established by the fact that the amended complaint alleges that Sloan visited the cite in the Andes Mountains of Panama where Canadian Javelin Ltd. was supposedly drilling for copper. However, paragraph 130 of the amended complaint clearly states that Sloan's visit took place on July 28th and 29th, 1973 which was after Sloan had stopped selling short and after Canadian Javelin Ltd. had reached its intermediate high of 14-5/8 on July 26, 1973. Similarly, Judge Bonsal cites Sloan's "study of [Canadian Javelin Ltd's.] timber project in Labrador." However, this study was undertaken

in response to Judge Bonsal's request for a complaint which set forth with particularity specific facts which constituted fraud.13

In short, almost everything Judge Bonsal says in his opinion is vastly distorted or unfair or inaccurate in some way. He criticizes Sloan for filing an amended complaint late although Sloan never moved for leave to file an amended complaint nor did any of the defendants express a desire to be on the receiving end of an amended complaint. It was Judge Bonsal's novel idea that an amended com-

13. At this point, it is not inappropriate to say that none of the defendants have argued that no fraud occured. During the time period involved here, there were a rash of newspaper articles which were followed by civil and criminal proceedings, all of which concerned matters involved in this lawsuit. In the Wall Street Journal of October 25, 1973 an article appeared entitled "Canadian Javelin doesn't have Gold Rights in Panama, Nation Says; Firm Disputes That." As a result of this article, trading was suspended on the American Stock Exchange. On page 10 of the Wall Street Journal for October 30, 1973 an article appeared entitled "Canadian Javelin Admits Its Announcement of Panama Mineral Rights Was 'Premature.' " This article stated that a July 5, 1973 announcement was false. That announcement had said that Bison Petroleum & Minerals Ltd., a subsidiary of Canadian Javelin Ltd. and a respondent here, had been granted a mineral exploration concession by the Panamanian government. This July 5, 1973 announcement commenced the precipitious rise in price which caused injuries to Sloan. On November 29, 1973, the S.E.C. got on the bandwagon by filing its own civil suit against Canadian Javelin Ltd. and this was followed on December 3, 1973 by a class action entitled *Bonime v. Canadian Javelin Ltd.*, 73 Civil 5117 (S.D.N.Y.) which was filed by the law firm of Wolf, Popper, Ross, Wolf & Jones. At about this time Doyle, another respondent here, who has been a fugitive from justice ever since he jumped bail following an adverse Court of Appeals decision in *United States v. Doyle*, 348 F. 2d 715 (2d Cir. 1965) *cert. denied* 382 U.S. 843, returned from Panama to Canada where, on December 7, 1973, he was promptly arrested. The Wall Street Journal for December 10, 1973 p. 10 col. 2 reported that Doyle, along with Oliver L. Vardy, another respondent here, had been charged with fraud, breach of trust and misappropriation of shares of Canadian Javelin Ltd., that bail had been set at $75,000 and that Doyle had been required to surrender his Canadian passport. The Wall Street Journal for December 12, 1973 p. 10 col. 2 reported that Anglo American Corp., yet another respondent here, announced that it had acquired 220,000 shares of Canadian Javelin Ltd. stock. All of these developments were reflected in Sloan's December 29, 1973 amended complaint.

plaint should be filed without the sufficiency of the existing complaint being passed upon. Judge Bonsal also *sua sponte* decided that Sloan would have twenty (20) days to file this amended complaint. Later, Sloan when requested additional time, Judge Bonsal refused to extend this courtesy although judges, including Judge Bonsal, almost routinely grant attorneys additional time to do things and in the New York State courts are virtually required to do so by judicial interpretations of CPLR §2001 and CPLR §2004. This is particularly true in the case of amended complaints, where leave to file is granted as a matter of course unless the delay is so great that a substantive right has been lost. See Weinstein, Korn & Miller, New York Civil Practice under the CPLR ¶3025.17.

Judge Bonsal also states that Sloan had four "opportunities" to prepare a sufficient complaint. (Appendix 17a) However, these opportunities, to the extent they existed, were not made available because of action by Judge Bonsal. Early in this lawsuit, Sloan purchased a second docket number when it became apparent that Judge

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Not only do these facts point towards a conclusion that a fraud was committed but they demonstrate the difficulties facing Sloan in marshalling all the facts in a rapidly unfolding situation so as to file an amended complaint in the action which was pending before Judge Bonsal. The complaint in the class action which was instituted at about the same time was deficient in all the respects which Judge Bonsal says that Sloan's complaint was deficient and, in addition, alleged few specific facts. However, that action was assigned to a different judge and no motion was filed to dismiss it. The defendants there, Canadian Javelin Ltd., Doyle and Wismer, subsequently agreed to settle by the payment of $1,350,000 in cash to the plaintiff class, all of which was to be paid by Canadian Javelin Ltd. Since October, 1975, Judge Lasker has been pondering the question of whether to approve this settlement. However, the question may now be academic since the Wall Street Journal for June 23, 1976, p. 16 col. 4, which discusses even more litigation involving Canadian Javelin Ltd., reports that the financial situation of Canadian Javelin Ltd. is so precarious that it can only cover the next two payrolls.

Bonsal was not going to permit Sloan to file an amended complaint freely and this explains the fact that this petition brings up for review two parallel lawsuits bearing different docket numbers.

In his opinion, Judge Bonsal expresses disapproval of Sloan's failure to appear in court for oral argument on January 14, 1974. However in the Court of Appeals, in the briefs and at oral argument, the appellees emphatically argued that the dismissal by Judge Bonsal was in no way related to Sloan's failure to appear in court on January 14, 1974. The reason for this was that the entire affair demonstrated not vexatious conduct on Sloan's part, but rather a clear and direct violation of the rules of court by various defense attorneys, all of which was sanctioned and apparently even encouraged by Judge Bonsal. On December 29, 1973, after delivering his amended complaint to the District Court, and after advising Judge Bonsal's law clerk that he would be out of the United States for a short time, Sloan went to Iceland. Contrary to what is implied in Judge Bonsal's decision (Appendix 16a) no motions to dismiss returnable January 14, 1974 had been filed and served at that time. Moreover, since Judge Bonsal only hears motions on Mondays, Sloan left the United States with the certain knowledge that no motion to dismiss the December 29, 1973 complaint could, in accordance with the applicable rules, be made returnable prior to January 21, 1974. This occurred because Rule 9(c)(2) of the General Rules for the Southern District of New York requires that the notice of motion and the accompanying memorandum of law be served at least ten days before the return date of the motion and Federal Rule of Civil Procedure 6(e) requires that the time be extended by three days when service is by mail. Thus, since all of the defendants in this case customarily served their papers by

mail, a total of thirteen (13) days notice was required for any motion. However, since December 30, 1973 was a Sunday and since December 31, 1973 and January 1, 1974 were holidays, the earliest date on which any paper could be served and filed was January 2, 1974, which was only twelve (12) days prior to January 14, 1974.

The docket sheet shows that counsel for Pressman, Frohlich & Frost, Inc. filed a motion to dismiss on January 2, 1974, that counsel for Standard & Poor's Corp. and counsel for Canadian Javelin Ltd. filed motions to dismiss on January 4, 1974, the counsel for Edwards — Hanly filed a motion for judgment on the pleadings on January 8, 1974, and that counsel for the American Stock Exchange filed "an affidavit in support of a motion to dismiss" without a notice of motion on January 11, 1974. All of these motions were made returnable on January 14, 1974 even though in no case did they comply with even the most fundamental court rules which require that a total of thirteen days notice of the hearing of the motion be given to the opposing party. Under these circumstances, the motion papers should not even have been received by the judge and Sloan would have been justified if he had ignored the matter entirely.

Sloan, however, did not ignore the matter entirely. On January 14, 1974 Sloan was in Stockholm, Sweden. In a telephone conversation with his "clerk"[14] he had learned of these motions and had instructed his clerk to call all of the moving parties and the district judge to advise them of the situation and to request an adjournment of one week to give Sloan time to return to the United States and prepare responses to these motions. This was done but neither the

14. A sixteen year old high school student named Richard Ilson who typed most of Sloan's papers.

moving parties nor the district judge would agree to a one week adjournment. The following Monday, Sloan's clerk appeared in court and explained the situation on the record. Contrary to what Judge Bonsal says in his opinion (Appendix 16a) Sloan's "clerk" did not say that Sloan would not return to the United States until February 11, 1974. A few days later, Sloan, who by that time was in Helsinki, Finland, called Judge Bonsal's chambers and offered to return to the United States forthwith but was told that no purpose would be served in doing so since the January 14, 1974 return date for motions had passed and no other motions were pending.[15]

The brief filed in the Court of Appeals on behalf of Dow, Jones & Co. et al criticized Sloan for "raising factors including telephone conversations outside of the record" (Brief, p. 11). Although this criticism is valid, it must be remembered that the key points in Judge Bonsal's decision and in the briefs filed by the appellees in the Court of

15. There clearly would be no justification for penalizing Sloan for taking a trip to Europe at this time. In fact, when a motion in this case was subsequently scheduled for oral argument in the Court of Appeals, the law firm of Patterson, Belknap & Webb, two days before the oral argument was scheduled to take place, requested and obtained an adjournment on the grounds the attorney on the case wanted to take a vacation in Europe during that week.

Similarly, it would be legally incorrect to penalize Sloan for failing to appear in court on January 14, 1974 since in so doing he would not be in default but would, at best, have waived his right to present oral argument. In a prior incident not mentioned in Judge Bonsal's opinion, the law firm of Stroock & Stroock & Lavan, counsel for Loeb, Rhoades & Co., had filed a motion but, apparently due to inadvertence, had failed to appear in court on the return date of the motion. Although an announcement which appears daily in the New York Law Journal states that Judge Bonsal hears oral argument on all motions, no sanctions were imposed on this law firm for failing to appear on that date.

Throughout this lawsuit, in both the District Court and the Court of Appeals, the defendants have made a number of requests for extentions of time to do various things, and in all instances these requests have been granted. There is nothing unusual in this. What is unusual is that, presumably because of Sloan's pro se status, Judge Bonsal refused to grant him any extentions of time whatever while freely giving extentions of time to the defendants.

Appeals are based upon facts which cannot be determined from the record. To reemphasize points previously made, the brief for Dow, Jones & Co. and others devotes one paragraph to what it says occurred at an oral argument on October 23, 1973 and at a second paragraph to what it says occurred at an oral argument on November 19, 1973 even though no record was made of either of these proceedings. It should be mentioned that only four defense attorneys were present on October 23, 1973 and two other defense attorneys were present on November 19, 1973 (although even this fact cannot be determined from the record) and thus no single defense attorney has personal knowledge of all of the oral proceedings in the District Court. The reason this occured was that the various defense attorneys did not inform each other of motion dates. Again, the defendants and not the plaintiff failed to comply with the Federal Rules of Civil Procedure. Fed. R. Civ. P. 5(a) provides that "every written motion . . . and every notice . . . shall be served upon each of the parties." In this case, none of the defendants who filed motions complied with this rule. The prevailing disorder of the day was to serve all motion papers upon Sloan and perhaps three or four other of the eighteen private attorneys who had appeared in this case. Of course, there may have been secret strategy sessions which coordinated the planned confusion which prevailed in the District Court but from what can be seen in the record itself none of the defense attorneys even took the trouble of proceeding to the District Court to find out who each other were until after Judge Bonsal made his decision of May 30, 1974.

One of the contentions advanced in Judge Bonsal's opinion was that the defendants somehow suffered prejudice by virtue of the fact that Sloan prepared four complaints. This contention is without merit since it has

long been held that no prejudice arises from the filing of a complaint. See *Jones v. S.E.C.*, 298 U.S. 1, 19-22 (1936) and authorities there cited. Moreover, this contention is premised upon an incorrect statement of the facts. However, it should be pointed out once again that Judge Bonsal himself is the originator of this idea since none of the defendants advanced, or could have advanced, the argument that they suffered prejudice by virtue of the existance of four complaints.

The first complaint named nine defendants and the action against one of these was subsequently discontinued by stipulation. The second complaint was essentially the same as the first except that it was filed under a new docket number and it named twenty four (24) new defendants, most of which were securities brokers and dealers. However, since the sufficiency of the original complaint was under attack in the form of motions to dismiss, Sloan did not arrange for the U.S. Marshal to serve the defendants with this complaint and consequently none of them can be said to have suffered inconvenience thereby. The third complaint made allegations in far greater factual detail. Sloan prepared this complaint with the idea of filling it as an amended complaint under either 73 Civil 3801 or 73 Civil 4403 or both and consequently informally mailed a copy to the eight attorneys who had by then appeared in this action. However, Judge Bonsal failed and refused to sign a proposed order submitted by Sloan granting leave to file this complaint and consequently the so-called third complaint, as such, cannot even be found in the record of the appeal except as an exhibit attached to the motion papers filed by one of the defendants. Clearly, no defendant suffered prejudice by the fact that Sloan drafted this complaint to which no defendant was ever required to answer or otherwise respond.

The so-called fourth complaint was served by the U.S. Marshal on all parties who could be located. Thus, although the District Court expounds at length on the existence of four complaints, it is readily apparent that only the first and the fourth complaints ever required a response.

Once this is recognized, another obvious misstatement of fact can be found in Judge Bonsal's opinion. The opinion states:

> "[E]ach of the 48 defendants in this action has been required to engage in costly and time consuming motion practice in responding to plaintiff's complaints as well as his numerous and frivolous motions and other court filings."

However, sixteen (16) of the forty-eight (48) named defendants never appeared or answered.[16] Another, Pickands, Mather & Co., Inc., obtained from the Court successive extentions of time to answer and, as a result, never had to file a response to Sloan's complaint. With few exceptions, none of the remaining defendants responded to more than one of the complaints and ironically the principal exceptions were two defendants against whom the action was dismissed without prejudice. By any count, less than half of the named defendants appeared in this appeal to the Second Circuit.

Of those which did appear in the District Court, many simply filed answers and did not move to dismiss. Moreover, as has already been noted, five of the law firms

16. The caption to this petition lists all 48 defendants as respondents. Lest there be confusion, it should be said that a number of them have never appeared and it seems unlikely that they will enter this case for the first time at the Supreme Court level. However, all the respondents are being served by mail and this is not illogical since Judge Bonsal dismissed Sloan's complaint as to all the defendants including those who never appeared.

which filed motions did not give Sloan the required thirteen (13) days notice. Thus, it is clear that although from Judge Bonsal's opinion one might conclude that these were 48 x 4 or 192 motions to dismiss filed in this case, the number of valid motions were few; so few, in fact, that in the Court of Appeals the brief for Dow, Jones & Co. et al relied primarily upon the argument that Judge Bonsal's opinion could be justified in accordance with the so-called "inherent power of a court to dismiss a complaint *sua sponte.*"

All of this should serve to demonstrate the egregious unfairness of what has occurred. Moreover, it should not be forgotten that even if it could be demonstrated that Sloan disobeyed a valid court order, a dismissal of the action cannot be sustained absent a showing that it was within Sloan's ability to obey. *Hovey v. Elliott,* 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 347-351 (1909). Here it is obvious that it would have been impossible for a pro se plaintiff or even for an attorney experienced in securities matters to prepare a comprehensive complaint within twenty days, particularly without guidance from the District Court as to what, if anything, was wrong with the complaints already prepared. Moreover, Sloan did not know and could not have known that the severe sanction of dismissal of the action with prejudice would result from his failure to file an amended complaint within twenty days. Indeed, it took Judge Bonsal himself five months, from December 29, 1973 until May 30, 1974, to make up his mind on the question of whether Sloan was late in the first instance. All of this demonstrates that Sloan has been deprived of his Fifth Amendment due process rights as well as his constitutional right to prosecute a lawsuit.

One of the things Judge Bonsal did to cover up the invalidity of his decision was to put the words "appearances omitted" on the cover page of his opinion. No doubt he feared that the attorneys for defendants, which included some of the largest and most prestigious law firms in New York City, would be disconcerted at having their names publically associated with arguments they did not make and which, as has been demonstrated, were patently frivolous. The abysmal weakness of the position of the defendants on appeal is demonstrated by the fact that, when this cause came on to be argued in the Court of Appeals, it was not argued by one of the many competent and qualified attorneys who had appeared in the District Court but by a rank outsider who, when faced with questions propounded by members of the panel of judges hearing this appeal concerning the course of the proceedings below, repeatedly responded with the words "I don't know." Although this response evoked some caustic remarks from Judge Gurfein, it is clear from the decision which subsequently came down that the strategy of the appellee's succeeded. Clearly, Sloan was aggreived by the impropriety of the appearance of this attorney in the Court of Appeals. Superficially, the inadequacy of his opponent would seem to be to Sloan's advantage. However, in this case, had the appeal been argued by one of the attorneys who appeared in the District Court, several of whom sat in the back of the courtroom listening to the argument of the appeal, that attorney would no doubt have been forced to conceed the impropriety of the actions of the District Court and hence the judgment would have been reversed.

Another important question presented in this petition is whether a panel of two judges has the power to decide an appeal. It seems obvious that under 28 U.S.C. §46(b) a

panel of three judges is required to hear and determine an appeal except in the case of an appeal decided by an in banc court which is governed by 28 U.S.C. §§46(c) and 46(d).[17] Since by its nature this question is reviewable only by the Supreme Court of the United States, this petition for a writ of certiorari should be granted, and since it is obvious that a panel of only two judges cannot decide an appeal, the decision of the Court of Appeals should be vacated and the cause remanded to that court. It is insufficient to state that the opinion of two judges would have prevailed over anything a third might have decided for, as the court observed in *Berkshire Employees v. NLRB*, 121 F. 2d 235, 239 (3d Cir. 1941), there is no way by which the influence of one upon the others can be quantitatively measured.

Finally, the validity of §0.23 of the Rules of the Second Circuit by which the Court of Appeals permits itself to dispose of appeals summarily, as it did here, is appropriately questioned in this petition. In his appeal to the Court of Appeals, Sloan filed a 70 page brief, a 20 page reply brief, and a 15 page petition for rehearing and suggestion that the rehearing be in banc. All of the arguments presented here were presented there. For their part, the appellees filed briefs of 29 and 21 pages which cited 36 and 18 cases respectively. It should be obvious that the arguments presented were substantial and that this appeal is not of the type amenable to summary disposition. Thus, by deciding the appeal as it did, the Court of Appeals has in effect deprived Sloan of his statutory right to appeal as well as his constitutional right to due process of

17. Perhaps from a misreading of 28 U.S.C. §46(d) the Court of Appeals mistakenly concluded that a quorum of two judges was sufficient to determine an appeal. However, that sub-section only applies to paragraph (c) which deals with in banc determinations.

law. cf. *Taylor v. McKeithen* 407 U.S. 191, 194 (1972); *NLRB v. Amalgamated Clothing Workers* 430 F.2d 966, 972 (5th Cir. 1970).

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Dated: June 23, 1976

Respectfully submitted,

Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Va. 24503

APPENDIX A

DECISIONS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and 76.

Present:

PAUL R. HAYS
WILLIAM H. MULLIGAN
MURRAY I. GURFEIN
Circuit Judges,

SAMUEL H. SLOAN,

Plaintiff-Appellant,

v.

CANADIAN JAVELIN LTD., et al.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of

record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the opinion of said District Court be and it hereby is affirmed.

This is an appeal from the opinion of the Hon. Dudley B. Bonsal, dismissing plaintiff's amended complaint for lack of prosecution. Under all the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm.

[not signed]
PAUL R. HAYS

s/William H. Mulligan
WILLIAM H. MULLIGAN

s/Murray I. Gurfein
MURRAY I. GURFEIN

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of April, one thousand nine hundred and seventy-six.

(SAME TITLE)

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by appellant (Pro Se), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of April, one thousand nine hundred and seventy-six.

Present:
HON. PAUL R. HAYS
HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN
Circuit Judges

(SAME TITLE)

A petition for a rehearing having been filed herein by appellant (Pro Se),

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/A Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 30, 1974

(SAME TITLE)

United States District Court, Southern District of New York. Nos. 73 Civ. 3801, 73 Civ. 4403, May 30, 1974.

APPEARANCES OMITTED.

BONSAL, D.J.

The plaintiff, Samuel H. Sloan, instituted this action *pro se* on September 4, 1973. Mr. Sloan (who was the sole proprietor and manager of Samuel H. Sloan & Company, a broker-dealer registered with the Securities and Exchange Commission until August 16, 1973, when its offices were closed) is a familiar *pro se* litigant in this Court. He appeared *pro se* in an action brought by the Securities and Exchange Commission ("S.E.C.") to enjoin him and his brokerage firm from violating the Securities Exchange Act of 1934 and the Rules promulgated thereunder by failing to maintain proper records and by failing to observe the net capital rules. In that action, a preliminary injunction was entered on June 24, 1971, and a permanent injunction was granted on January 7, 1974. See *S.E.C. v. Samuel H. Sloan & Co.*, 369 F. Supp. 996 (S.D.N.Y. 1974). In another case, Mr. Sloan, as plaintiff *pro se*, instituted an action against the President and Vice-President of the United States to

enjoin them from continuing in their offices and to annul the appointments of the Chief Justice of the United States and three Associate Justices of the Supreme Court. This complaint was dismissed, *Sloan v. Nixon*, 60 F.R.D. 228 (S.D.N.Y. 1973), and the dismissal was affirmed without opinion by the Court of Appeals on February 26, 1974.

In this action, Mr. Sloan appears *pro se* in the role of an allegedly defrauded investor in connection with his purchases and sales of the stock of defendant Canadian Javelin Limited ("CJV"). Plaintiff alleges in the most recent amended complaint, which was filed on December 29, 1973[1] ("the amended complaint of December 29, 1973"), that the "acts and transaction (Performed by the defendants) . . . constitute violations of Sections 5, 12, 15 and 17 of the Securities Act (of 1933), Sections 9(a), 10(b), 13(d), 15(c) and 18(a) of the (Securities) Exchange Act (of 1934), Rules 10(b)-5 and 15(c) 3-3 promulgated thereunder, the rules of the New York Stock Exchange, the American Stock Exchange and the National Association of Securities Dealers, state law and the principles of common law." The amended complaint of December 29, 1973 alleges that plaintiff is "both a purchaser and a seller of shares of (CJV)," and that "(p)laintiff was at all times from January to August of 1973 a short seller of (CJV) shares." While the amended complaint of December 29, 1973, does not set forth the dates of each of plaintiff's transactions nor the prices at which the shares were purchased or sold by plaintiff, it does allege that from June 21, 1973 to August 16, 1973, "plaintiff held a substantial short position (CJV) shares" and that he had "entered purchase orders with

1. Because December 29, 1973 was a Saturday, the amended complaint was not file-stamped until January 2, 1974. A handwritten notation, however, appears on the face of the amended complaint indicating that it was received in the Clerk's office on December 29, 1973.

various stock brokers . . . which, had these orders been filled, would have covered his short position." With respect to his alleged injury plaintiff alleges that while he was in short position, the price of CJV stock on the American Stock Exchange ("AMEX") went up by reason of allegedly false press releases, stockholders' letters, and the annual report issued by the company and its officers and by reason of the publication of articles in newspapers, financial advisors' newsletters, and a mining industry trade journal; and that he was unable to cover his short position because of the conspiracy of the defendants, including AMEX, brokers, and broker-dealers, in not honoring his orders to buy. Alleging that he has suffered great financial loss by reason of the activities of the defendants, Mr. Sloan instituted this dragnet lawsuit, naming as defendants CJV, two of its subsidiaries, AMEX, various financial publications, a number of brokers and broker-dealers, a Newfoundland engineering concern, and a former Deputy Minister of Economic Development of Newfoundland, together with a number of officers and directors of corporate defendants. There are 48 defendants in all.

The amended complaint of December 29, 1973 is a voluminous document of 43 pages and consisting of 253 numbered paragraphs. It contains ten counts. In the first count, Sloan alleges that CJV has never filed a registration statement as required by the Securities Act of 1933 and that defendants either permitted CJV's shares to be purchased and sold or themselves purchased and sold CJV shares in the absence of a registration statement. In count 2, Sloan alleges that due to the publication and dissemination to the investing public in the first nine months of 1973 of allegedly false and misleading statements and reports, the price of CJV shares rose sharply and plaintiff was thereby unable profitably to cover his short position in CJV shares. The statements and

reports alleged to have been false and misleading concerned an alleged major find of copper in Panama and were to the effect that CJV had the right to exploit the find and that development of the properties in Panama was about to commence. In count 3, Sloan alleges that CJV's 10-K, 8-K and 10-Q reports filed with the S.E.C. are "invalid on their face." In count 4, Sloan alleges that the proxy statement sent by CJV "pursuant to its annual meeting of May 9, 1973 failed to disclose material information." In count 5, Sloan alleges that defendants John C. Doyle ("Doyle") and Anglo American Corp. failed to make timely disclosures of their transactions in CJV stock. In count 6, Sloan alleges that defendants conspired to manipulate the market in CJV shares by creating a misleading appearance of active trading. In count 7, Sloan alleges that AMEX failed to regulate and supervise defendants Dyer, Maguire, Dritz & Co. ("Dyer"), a specialist, and Burns Bros. & Timmins, Inc. ("Timmins"), a floor trader in CJV shares. In count 8, Sloan alleges that various defendants were negligent in permitting false and misleading information to be disseminated about CJV. In count 9, Sloan alleges that defendants CJV and Doyle have violated an S.E.C. injunction issued on September 25, 1958. And in count 10, Sloan alleges that various broker defendants conspired with AMEX to cancel Plaintiff's purchase orders for CJV shares, as a result of which plaintiff was unable to cover his short position in CJV shares and allegedly was forced to go out of business on August 16, 1973. Plaintiff seeks "actual damages" in the amount of $2,063,000, a "declaratory judgment in the amount of $125,000, "punitive and exemplary damages in the amount of $5,000,000"[2], plus

2. In actions under the Securities Exchange Act of 1934, punitive and examplary damages are not recoverable. 15 U.S.C. Sec. 78bb(a). Seen *Green v. Wolf Corporation*, 406 F.2d 291, 302-03 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

interest and costs.

While the ad damnum asks for actual damages, a declaratory judgment, and punitive and exemplary damages, plus costs, the document reads as though Mr. Sloan was substituting himself for the S.E.C. in seeking to enforce the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 with respect to CJV and the numerous defendants named. Indeed, the S.E.C. has already instituted an action in this Court (*S.E.C. v. Canadian Javelin Limited, et al.*, 73 Civ. 5074) against CJV, Doyle (a Director and Chairman of its Executive Committee), and William M. Wismer ("Wismer") (its President), which action is presently pending before Judge McMahon. The S.E.C. complaint charges the defendants with dissemination of false and a misleading material information, particularly with respect to a press release of June 22, 1973 and a press release issued by Bison Petroleum and Minerals, Ltd. ("Bison") on July 5, 1973, which are also subjects of Mr. Sloan's complaint here. Mr. Sloan has moved to consolidate the S.E.C. action (73 Civ. 5074) with this action (73 Civ. 3801 and 73 Civ. 4403), which motion has been opposed by the S.E.C. In support of his motion to consolidate, Mr. Sloan states the following as among his reasons: "if it is necessary for Sloan to appeal he may be able to share costs with his friends at the Commission", "the Commission is able to obtain a limited amount of cooperation from the defendants while Sloan has been unable to do so"; "(i)f these actions are consolidated, Sloan's chance of success against Javelin, Doyle and Wismer will be increased and therefore the other defendants will have less to worry about"; and "Sloan would appreciate all the free legal help from the S.E.C. he can get."

The S.E.C.'s opposition to consolidation is that its action

is "primarily a statutory action, basically in equity, to protect the investing public from future violative activity of the securities laws and to seek equitable relief in regard to future activities." Parenthetically, it may be noted that Mr. Sloan's desire to cooperate with the S.E.C. is of recent vintage. In a statement sworn to on December 29, 1973, which appears at the end of the amended complaint of December 29, 1973 but appears to have no relevance to it, Mr. Sloan makes the following statement:

> "I submit that my records were in my office at all times during the course of a three year period when I was in business and the Commission staff chose to examine them on only a handful of occasions. Their late blossoming interest in my records stemmed solely from a desire to engage in a fishing expedition to develop new theories on which to base their case in court."

Accordingly, plaintiff's motion to consolidate 73 Civ. 3801 and 73 Civ. 4403 with 73 Civ. 5074 is denied.

This litigation has had a varied course, beginning on September 4, 1973, when plaintiff filed his first complaint (73 Civ. 3801). The original complaint alleged that CJV and the eight others named as defendants disseminated or played a part in the dissemination to the investing public of false and misleading information about CJV, as a result of which Plaintiff alleged he "suffered greatly"; plaintiff sought actual and punitive damage in the amount of $150,000 plus costs. Three of the defendants moved to dismiss the complaint, but prior to the return data on those motions, plaintiff filed another complaint on October 12, 1973 (73 Civ. 4403), naming as defendants all but one of the original nine defendants[3] and 24 others.

3. A stipulation dismissing the action as against defendant George B. Mickum was filed on October 9, 1973.

The October 12, 1973 complaint, alleged that CJV "employed a wide variety of fraudulent means to cause an artificial rise in the price of its stock"; that AMEX gave "its official sanction to these fraudulent and manipulative practices"; and that the defendants disseminated or participated in the dissemination of false and misleading information about CJV. The October 12, 1973 complaint alleged that plaintiff engaged in "purchases, sales, and borrowings" of CJV shares, which allegedly "were effected either directly or indirectly to or through the sixteen stock brokerage firms" named as defendants. Plaintiff also alleged that at the time of the filing of the October 12, 1973 complaint, he was "the registered owner of 13 shares" of CJV stock.[4] Plaintiff sought damages in the amount of $170,000, plus costs and interest.

Plaintiff then prepared, but did not file, a "proposed amended complaint," copies of which he states were mailed to all of the attorneys for the defendants who had then appeared in either action. Several defendants then moved to dismiss all of the pending complaints, which motions were made returnable on November 19, 1973. At oral argument on November 19, 1973 with plaintiff present, the Court denied the defendants' motions to dismiss without prejudice to renewal, and granted leave to the plaintiff to serve and file a "final" amended complaint within twenty days. On December 29, 1973, nineteen days after the twenty-day period had expired, plaintiff filed the present amended complaint.

Defendants CJV; Bison; Canada Permanent Trust

4. While the amended complaint of October 12, 1973 alleges that plaintiff was then "the registered owner of 13 shares" of CJV stock, the amended complaint of December 29, 1973 contains no allegation with respect to what became of those 13 shares and also no allegation that plaintiff still owns any shares of CJV.

Company ("CPT"); Wismer; Loeb, Rhoades & Co. ("Loeb"), Standard & Poor's Corporation ("S&P"); AMEX; Pressman, Frohlich & Frost, Inc. ("Pressman"),[5] Stewart Pinkerton ("Pinkerton"); McGraw-Hill, Inc. ("McGraw"); Wright Engineers Limited ("Wright"); and Miller-Freeman Publications, Inc. ("Miller") move pursuant to Rule 12(b), Fed. R. Civ. P., to dismiss the amended complaint of December 29, 1973 as against them. Defendants have asserted various grounds in support of the motions, including the failure of the plaintiff to serve and file a timely "final" amended complaint. Edwards & Hanly ("Edwards") moves pursuant to Rule 12(c), Fed. R.Civ. P., for judgment on the pleadings on the grounds that the Court lacks subject matter jurisdiction, that an action for the identical relief sought here is pending in the Supreme Court of the State of New York, and that the amended complaint of December 29, 1973 fails to state a claim upon which relief may be granted. Defendants Chartered New England Corporation ("Charterèd") and F.S. Moseley, Estabrook ("Mosley") move pursuant to Rules 21(b) and 12(f), Fed. R.Civ.P., to dismiss or strike the amended complaint of December 29, 1973 as against them on the grounds that the plaintiff failed to comply with this Court's order of November 19, 1973 (granting leave to plaintiff to serve an file a final amended complaint within twenty days of November 19, 1973. Defendant The Miami Herald ("Herald") moves pursuant to Rule 56, Fed. R.Civ. P., for summary judgment dismissing the amended complaint of December 29, 1973 against it on the ground that there is no genuine issue of fact to be tried. Defendant Bache & Co., Inc. ("Bache") moves pursuant to Rule 54(b), Fed.R.-Civ.P., for an order directing the clerk to enter a final

5. Pressman also moves for an order enjoining the plaintiff from "further annoyance and harassment of the defendants herein."

judgment by default on Bache's counterclaim against the plaintiff in this action.

Plaintiff moves pursuant to Rule 56(a), Fed.R.Civ.P., for summary judgment against defendants CJV, AMEX, S&P, the Herald, Dow Jones and Co., Inc. ("Dow Jones"), Pinkerton, Bison, Wismer, CPT, Steven L. Gerard ("Gerard"), McGraw, Edwards, Robert Della ("Della"), Arthur Foote ("Foote"), and Raymond Aronson ("Aronson") on the ground that no triable issues of fact exist with respect to these defendants. Plaintiff also moves pursuant to Rule 56(a), Fed.R.Civ.P., for summary judgment against defendant Wright, or in the alternative, pursuant to Rule 37(a), Fed.R.Civ.P., for an order compelling discovery of documents from Wright.[6] Plaintiff also moves for an order staying four states court actions that have been commenced against him by defendants in this action.

In their motions to dismiss the amended complaint of December 29, 1973, defendants contend that it fails to state a cause of action in that plaintiff has failed to allege "causation, reliance or standing to sue." In addition, defendants contend that plaintiff's allegedly unclean hands precludes his maintaining this action. The amended complaint of December 29, 1973 describes in detail the alleged false press releases and manipulative activities of some of the named defendants, but it fails to show that Mr. Sloan was in any way directly injured thereby. On the contrary, Mr. Sloan describes a trip he took to Panama to examine an alleged CJV copper find, his study of the information set forth in press releases and other reports

6. Wright also moves pursuant to Rule 26(c), Fed.R.Civ.P., for an order that no discovery may be had against it prior to a determination of its motion to dismiss.

about CJV. Mr. Sloan admits that he knew all along that information disseminated by CJV and its officer and published in the various financial media named as defendants was false. It appears that he was not a victim of the fraud, if one was committed. Nor does it appear that he imparts his knowledge to other potential investors. Instead, it appears he sought to capitalize on the fraud. There is no authority for the proposition that one who uses the fraud of another for his own personal advantage has a claim under the Securities Act of 1933 or under the Securities Exchange Act of 1934 when that fraud is later exposed. *Cf. Kuehnert v. Texstar Corporation*, 412 F. 2d 700 (5th Cir. 1969); *Chris-Craft Industries, Inc. v. Independent Stockholders Committee*, 354 F.Supp. 895, 921-22 (d. Del. 1973).

Defendants also move to dismiss the amended complaint of December 29, 1973 on the grounds that it was not filed until after the twenty-day period had expired and that it is therefore untimely. In a memorandum in opposition to the motions to dismiss, plaintiff states that from December 11, 1973 to December 22, 1973, he was on trial as a defendant in the action brought by the S.E.C. to enjoin him from violating the Securities Exchange Act of 1934 and Rules promulgated thereunder (*S.E.C. v. Sloan, supra*). Plaintiff contends that because of this trial, he could not devote his "full attention to preparing the amended complaint" until after the trial had been concluded, but that thereafter he has prosecuted this action with diligence.

Defendants, however, contend in support of their motions to dismiss the amended complaint of December 29, 1973 that plaintiff had no adequate excuse for his failure to comply with this Court's order of November 19, 1973 and that the numerous complaints and motions filed by the plaintiff have caused them undue prejudice.

Rule 41(b), Fed.R.Civ.P., provides:

> "For failure of the plaintiff to prosecute or to comply with those rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

As the Court of Appeals has stated:

> "Under [Rule 41(b)] and the inherent power of a court to dismiss for failure to prosecute, a district judge may, *sua sponte*, and without notice to the parties, dismiss a complaint for want of prosecution, and such dismissal is largely a matter of the judge's discretion. (citing cases)"

Taub v. Hale, 355 F. 2d 201, 202 (2d Cir. 1966). See *Link v. Wabash R.R.*, 370 U.S. 626 (1962); *Redac Project 6426, Inc. v. Allstate Insurance Co.*, 412 F.2d 1043 (2d Cir. 1969); 5. J. MOORE, FEDERAL PRACTICE Par. 41.11—41.12 (2d ed. 1964). The factors to be weighed have been enumerated by the Court of Appeals for the Ninth Circuit in *States Steamship Co. v. Philippine Air Lines*, 426 F. 2d 803, 805 (9th Cir. 1970):

> "(1) the (plaintiff's) right to a hearing on its claim, (2) the impairment of (defendants') defenses presumed from the unreasonable delay, (3) the wholesome policy of the law in favor of the prompt disposition of law suits, and (4) the duty of the (plaintiff) to proceed with due diligence."

Here, the Court notes that the twenty-day period granted plaintiff in order to serve and file his "final" amended complaint began on November 19, 1973 and ended on December 10, 1973. An amended complaint was not filed until December 29, 1973—nineteen days later. The trial in which plaintiff was involved did not commence until December 11, 1973, which was after the period for serving and filing his amended complaint in this action had already expired. Plaintiff also states that immediately after he filed

the amended complaint of December 29, 1973 he left for Iceland. Even though he had notice that several defendants had made motions to dismiss the amended complaint of December 29, 1973 and that these motions were returnable on January 14, 1974, plaintiff was not present in court for oral argument on the motions. Instead, he sent a clerk from his office to inform the Court that he was traveling through Europe and would not return to the United States until February 11, 1974.

It appears from the affidavits submitted in connection with the present motions that four actions have been commenced in the New York State courts by Chartered; Weiss & Baer, Inc.; Pressman; and Edwards against Mr. Sloan for damages in connection with purchases by the four brokerage firms of CJV shares which Mr. Sloan allegedly was unable to deliver and as to which the brokerage firms allege they were compelled to execute "buy-ins." In two of these actions, motions for summary judgment against Mr. Sloan have been granted. Plaintiff's attempt to delay the disposition of those actions by his naming of each of the four brokerage firms as a defendant in this action and by his moving to have the state actions stayed is evidence of the undue burden that defendants may have to bear if this cumbersome action in the federal court is permitted to interfere with the progress of the state court actions.

Moreover, each of the 48 defendants in this action has been required to engage in costly and time-consuming motion practice in responding to plaintiff's complaints as well as his numerous and frivolous motions and other court filings. While the plaintiff is entitled to his day in court, and in addition, since he appears *pro se*, is entitled to a degree of latitude in the framing of pleadings and motions, it is unfair and prejudicial to the defendants here if they are required to engage in round upon round of costly and time-

consuming motion practice directed to a complaint that the plaintiff did not even timely file.

Plaintiff, who it appears is an experienced trader in the securities markets had three opportunities to frame an adequate complaint prior to the Court's granting him his "final" opportunity on November 19, 1973. In each of the first three instances, the complaint failed to meet the specificity requirements of Rule 9(b), Fed.R.Civ.P., with respect to each defendant. As the Court of Appeals said in *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972):

> " 'Mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient' (citing *Shemtob v. Shearson, Hammill & Co.*, 448 F. 2d 442, 444 (2d Cir. 1971); '. . . there must be allegation of facts (in a complaint under Rule 10b-5) amounting to deception in one form or another.' (citing *O'Neill v. Maytag*, 339 F.2d 764, 768 (2d Cir. 1964))."

In discussing the rationale behind this rule, the Court of Appeals said:

> "Rule 9(b)'s specificity requirement stems not only from the desire to minimize the number of strike suits but also more particularly from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." 467 F.2d at 607.

Because allegations of fraud made against accountants and others whose business depends on clients' trust and confidence can threaten their entire professional status, Rule 9(b) requires that plaintiffs set forth more completely than in an ordinary complaint the factual circumstances that allegedly entitle them to relief. See *Frazier v. Stellar Industries, Inc.*, 72 Civ. 2829 (C.D. Cal. memorandum opinion filed November 15, 1973).

In light of the standards of Rule 9(b), the amended complaint of December 29, 1973 lacks the required specificity, such as with respect to whether plaintiff relied on the alleged false and misleading statements and reports, whether the alleged fraudulent statements were made in connection with a purchase or sale of a security by him and whether the injuries of which plaintiff complains were caused in fact by defendants' alleged fraudulent activities. See *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, F.2d , Dt. No. 73-1677 (2d Cir., filed April 3, 1973).

Since plaintiff has had ample opportunity to frame a complaint meeting the requirements of the federal securities laws and the Federal Rules of Civil Procedure, permitting a further opportunity to amend the complaint would only further delay the ultimate disposition of this action. Had the final amended complaint been filed within the period directed by the Court, it would have been dismissed as to all of the defendants except CJV, Doyle, and Wismer, and stayed as to these defendants pending final determination of the S.E.C. action (73 Civ. 5074). However, in view of the untimeliness, defendants' motions to dismiss the amended complaint of December 29, 1973 pursuant to Rule 41(b), Fed.R.Civ.P., are granted and all pending complaints are dismissed with prejudice as to all defendants, except that with respect to CJV, Doyle, and Wismer, all pending complaints are dismissed without prejudice. Since the statute of limitations has not run, Mr. Sloan may, if he is so advised, institute a new action by filing a new complaint meeting the requirements of the federal securities law and the Federal Rules of Civil Procedure with respect to CJV, Doyle and Wismer.

Plaintiff having filed a reply to defendant Bache's counterclaim on May 7, 1974, Bache's motion for a final

judgment by default pursuant to Rule 54(a), Fed.R.Civ.P., is denied.

Because of this disposition, the Court does not reach the other motions presented.

Settle order on notice.

APPENDIX C
SUMMARY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 17, 1974

Motion Denied.

APPENDIX D
JUDGMENT DATED JUNE 11, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL H. SLOAN,

Plaintiff,

-against-

CANADIAN JAVELIN LTD., et al.,

Defendants.

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73 Civ. 4403 & 3801 (DBB)

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion dated May 30, 1974, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

(1) The amended complaint, filed on December 29, 1973, be and the same hereby is dismissed with costs and with prejudice as to all defendants except Canadian Javelin Ltd., John C. Doyle and William M. Wismer.

(2) The amended complaint, filed on December 29, 1973, be and the same hereby is dismissed without prejudice as to Canadian Javelin Ltd., John C. Doyle and William M. Wismer.

(3) The motion by defendant Bache & Co. Incorporated

for a final judgment on its counterclaim pursuant to Rule 54(b) of the Federal Rules of Civil Procedure be and the same hereby is denied.

(4) The default judgment (#74044) of Bache & Co. Incorporated is hereby set aside and the counterclaim of Bache & Co. Incorporated is hereby dismissed without prejudice, there being no independent grounds for jurisdiction.

Dated: New York, New York
June 7, 1974

s/ Dudley B. Bonsal
Dudley B. Bonsal
U.S.D.J.

Judgment entered
June 11th, 1974

s/ Raymond F. Burghardt
Clerk